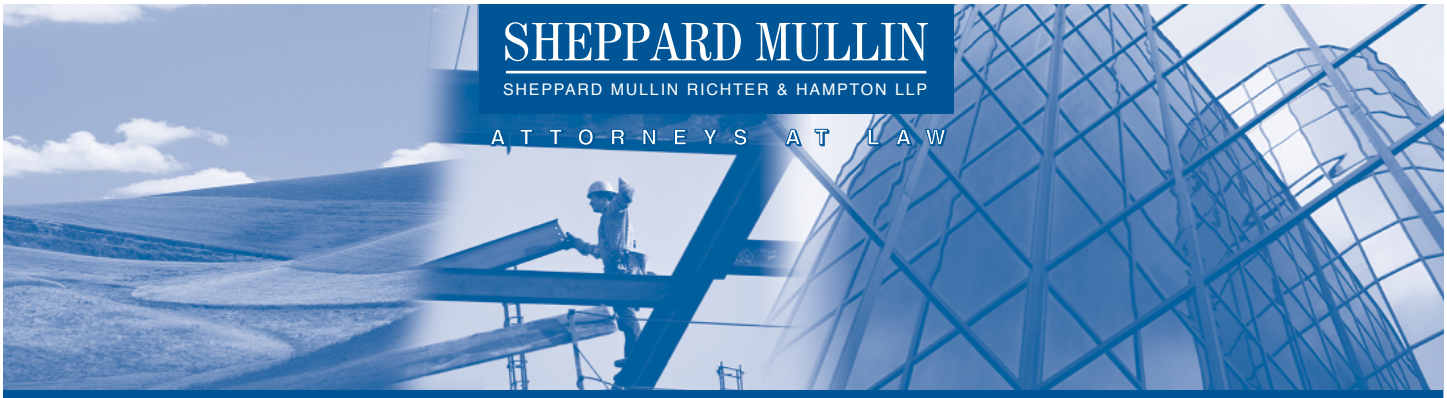


# Real Estate and Environmental Client Update

*October 2004*

# Ninth Circuit Raises the Level of Protection Afforded to Critical Habitat

In a ruling with broad implications for land development in California, the Ninth Circuit Court of Appeals recently overturned the U.S. Fish and Wildlife Service's longstanding interpretation of the Endangered Species Act's requirement to prevent adverse modification of designated critical habitat. The Ninth Circuit found that the Endangered Species Act prohibits any federal action which appreciably diminishes the value of critical habitat for the recovery of a listed species and invalidated the Service's regulation which limited protection of critical habitat to those actions which would potentially impact the value of critical habitat for the survival of a listed species. Although the U.S. Fish and Wildlife Service will need to determine the precise regulatory meaning of "adverse modification" and "recovery," it is likely that this ruling will require the Service to further limit the activities which can occur within designated critical habitat and increase the economic consequences associated with designations of critical habitat. The ruling also applies to the National Marine Fisheries Service as the regulatory definition of adverse modification is a joint rule.

**ABOUT THIS UPDATE**

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## BACKGROUND

Under the Endangered Species Act, the Service and NMFS are required to designate as critical habitat areas which are essential to the conservation of listed species. Once such areas are designated, the Endangered Species Act prohibits federal agencies from permitting, funding or carrying out any activity

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which will result in "destruction or adverse modification" of such habitat. The protection provided to critical habitat is in addition to the protection given to individual members of listed species. Under the Act, it is unlawful for any person to "take" a listed species or for a federal agency to permit or engage in an activity which would jeopardize the continued existence of a protected species. In order to determine whether a proposed activity would result in adverse modification of critical habitat or jeopardy to a listed species, the federal agency with jurisdiction over a proposed project is required to consult with the Service or NMFS.

For the past twenty-five years, the Service and NMFS have interpreted the terms "jeopardize" and "destruction or adverse modification" to be practically equivalent; defining by regulation both terms to involve an evaluation of whether a proposed activity would appreciably diminish both the survival and recovery of a listed species. This has meant that for most projects there has been little or no tangible effect if the area where the activity would occur fell within designated critical habitat. So long as the project proponent could demonstrate that the activity would not lead to the extinction of the species, the project was not prohibited by the Act. Based on this interpretation, the Service and NMFS utilized a broad geographic approach to designating critical habitat, reasoning that such designations were of little practical significance and that there was no justification for assigning the critical agency resources which would be needed to make more precise designations.

## THE CASE

The case, *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, raised the question of whether the Service was adequately protecting the designed critical habitat of the northern spotted owl in Washington, Oregon and California. The Court overturned six biological opinions issued by the Service that allowed for timber harvest projects within areas designed as critical habitat for the spotted owl because it found that the biological opinions relied on an invalid regulatory definition of 'destruction or adverse modification of critical habitat.' The Court found that the Service's definition of adverse modification, requiring a finding that the activity would appreciably diminish both the survival and recovery of a species, afforded too little protection to designated critical habitat and was in direct contradiction of Congress' express command in the Endangered Species Act to foster both the survival and recovery of listed species. The Court determined that the Act requires protection of critical habitat from federal actions which impact recovery of a species alone. The Court found that the focus on recovery would set a higher standard and would likely provide additional protection to listed species, allowing for the obtainment of the two goals of the Act: the survival and conservation of listed species.

On September 10, 2004, the Department of Justice, on behalf of the Service, filed a request to extend the time within which it could file a petition for rehearing with the Ninth Circuit until October 20, 2004, indicating a strong likelihood that the Service will request a reconsideration of this case.

## IMPLICATIONS OF THE DECISION ON LAND DEVELOPMENT PROJECTS

If the Ninth Circuit decision stands, the Service and NMFS will have to apply a higher standard when evaluating whether an activity can occur within designated critical habitat. The Services have yet to give any indication of how they will carry out consultations which involve potential impacts to designated critical habitat. Following similar rulings in 2001 by the Fifth Circuit (*Sierra Club v. U.S. Fish & Wildlife Service*) and Tenth Circuit (*New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*), the Bush Administration indicated that the Department of Interior was re-evaluating the definition of

adverse modification but has, to date, issued no official guidance on how consultations involving critical habitat should be carried out.

Without such official guidance, it is difficult to predict how significant a difference a new standard could make. Taken to an extreme, the Services could determine that no activity which alters any part of the designated habitat utilized by the listed species at issue could occur, creating in practice refuges wherein no activity requiring federal permits, like dredge and fill permits issued by the Corps of Engineers, or federal funding could be carried out. Conversely, the Services could determine that so long as the impacts of the activity were fully compensated by mitigation, thereby ensuring that the activity does not appreciably reduce the chances of recovery of the species, the activity could proceed in designated critical habitat. Whatever the result, it seems likely that the consultation process will become more onerous, time consuming, and expensive to successfully navigate if a higher threshold is put in to practice. Further, environmental groups opposed to a proposed activity will have an additional weapon in their arsenal to challenge projects and until the Service revised interpretation of adverse modification is judicially approved, there is likely to be a great deal of uncertainty in how such matters will be resolved. Past biological opinions may also be vulnerable if they do not expressly address the issue of the permitted activities impact on the recovery of the listed species or if they allow for impacts on critical habitat to be mitigated outside the designated critical habitat. The Service and/or the action agencies could decide to revisit prior biological opinions involving analysis of impact to critical habitat and if the agencies do not take such action under their own initiative, environmental groups or those opposed to particular projects may bring a challenge to those opinions. If the agencies do not take such action under their own initiative, environmental groups or those opposed to particular projects may bring a challenge based on their failure to reinitiate consultation.

The potential implications from a heightened standard are of tremendous concern to anyone working on development projects in California because of the sweeping approach the Service and NMFS have taken to critical habitat designations. For example, the Service has made the following critical habitat designations in California over the last few years: 4.1 million acres for the California red-legged frog; 844,897 acres for the Peninsular Bighorn Sheep; 513,650 acres for the California gnatcatcher; 301,010 for the Quino checkerspot butterfly; 23,903 acres for the Bay checkerspot butterfly, 4,025 acres for the San Diego fairy shrimp, 2,565 acres for the Morro shoulderband snail; 6,870 acres for the Riverside fairy shrimp; 182,360 acres for the Arroyo southwestern toad; 1,828 acres for the Baker's larkspur, and 2,525 for the yellow larkspur. Given these broad designations, it is likely that a significant number of development projects in California will potentially effect critical habitat and require consultation if there is a federal nexus.

Finally, the new decision may impact the number and extent of critical habitat designations. Given that the Service and NMFS expressly relied on the now invalid regulation to define the areas which should be considered critical habitat, we believe that many of the existing designations may be vulnerable to challenge. Conversely, given the raised bar now associated with critical habitat designations in the wake of the Ninth Circuits decision, it is likely that environmental groups will continue to press for more designations.

If you have any questions regarding how the revised definition of adverse modification could affect your interest, please contact either Robert Uram at ruram@sheppardmullin.com or Ella Foley-Gannon at efoleygannon@sheppardmullin.com.

## ABOUT THE AUTHORS

*Robert J. Uram* has more than 30 years experience in working on natural resource issues. He is a nationally recognized expert on Clean Water Act and Endangered Species Act issues, including Section 404 permitting, water quality and storm water issues and habitat conservation planning. In addition to representing landowners, resource developers and local governments on permitting issues, he also represents large coalition groups on rulemaking matters and litigation involving wetlands and endangered species issues. He served in the Clinton Administration as Director of the Office of Surface Mining Reclamation and Enforcement, a federal agency in the Department of the Interior that regulates coal mining and administers an abandoned mined land reclamation program. He was recently recognized by San Francisco Magazine as a "Super Lawyer 2004." For more information, please contact Robert at (415) 774-3285 or ruram@sheppardmullin.com.

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